

**FILED**

**JUN 11 2008**

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

MARCELLINO PENA,	)	CV 08-28-H-DWM-RKS
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
DENISE DEYOTT and MIKE MAHONEY,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff Pena, a state prisoner proceeding pro se, has filed a Complaint under 42 U.S.C. § 1983 alleging violations of his constitutional rights stemming from the Montana State Prison's alleged mishandling of his mail.

United States Magistrate Judge Keith Strong conducted preliminary screening of the Complaint as required by 28 U.S.C. § 1915(e)(2). Under that statute, the court engages in a preliminary screening to assess the merits of the claims and identify cognizable claims, or dismiss the complaint or any portion thereof if the complaint is frivolous, malicious, or fails to state a claim upon which relief can be granted.

Judge Strong issued Findings and Recommendations in which he recommends dismissal of the Complaint without prejudice for

failure to exhaust administrative remedies. Judge Strong notes that while Plaintiff appears not to have filed an administrative grievance, Montana State Prison has a detailed grievance procedure that must be exhausted before Plaintiff can proceed in this Court.

Plaintiff Pena timely objected, thereby preserving his right to de novo review of the record. 28 U.S.C. § 636(b)(1). In his objection Pena argues that exhaustion of administrative remedies is not a pleading requirement. That is a legal proposition that Judge Strong acknowledges in his recommendation. Judge Strong then goes on to explain that a complaint may be subject to dismissal for failure to state a claim when an affirmative defense (such as failure to exhaust) appears on the face of the pleading, citing Jones v. Bock, 127 S.Ct. 910, 920-921 (2007). The Plaintiff has not set forth a valid legal objection to Judge Strong's conclusion.

Upon de novo review, I agree with Judge Strong's Findings and Recommendations and adopt them in full.

Accordingly, IT IS HEREBY ORDERED that the Complaint is DISMISSED for failure to exhaust administrative remedies.

DATED this 11th day of June, 2008.

  
\_\_\_\_\_  
Donald W. Molloy, District Judge  
United States District Court